Supreme Court, U.S.
FILED
06-453 JUN 15 2006
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IN THE

SUPREME COURT OF THE UNITED STATES

JUNE 14, 2006

No.

JUAN A. GIRALDO
Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT

FOR THE FIRST CIRCUIT

PETITIONER BRIEF

Prepared by:

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STATEMENT OF ISSUE

Petitioner, Juan A. Giraldo, respectfully prays that a Writ of Certiorari be issued to review the Judgment of the United States Court Appeals for the First Circuit, entered on March 17, 2006 (No. 05-2192).

THE FUNDAMENTAL QUESTION HERE IS IF THE SIXTH AMENDMENT RIGHTS OF THE PETITIONER ARE BEING VIOLATED OR NOT. HIS SENTENCE HAS BEEN ENHANCED BASED ON FACTS NOT FOUND BY A JURY OR ADMITTED BY THE DEFENDANT (TWO LEVEL INCREASE FOR A LEADERSHIP ROLE)

The Judgment of the United States Court of Appeals for the First Circuit, on March 17, 2006 which affirms the sentence imposed by the District Court of Providence, Rhode Island (The Honorable William E. Smith – 04 CR 74-01 S), is attached hereto as Appendix "A". A copy of the Governments Motion for Summary Disposition (Basis of the Court of Appeals decision), dated March 09, 2006, is attached hereto as Appendix "B.

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Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1 (1988).....1

U.S.S.G. Manuel, Introduction and General Application Principles 1, 3

STATEMENT OF JURISDICTION

Jurisdiction is conferred by 18 USC §1254.

STATEMENT OF FACTS

The petitioner was born in Pereira Colombia in 1965. He attended high school and the University where he completed a four year program in engineering studies. In 1987 he immigrated to the United States, and ultimately formed the Interpreter Services Corporation. In this capacity he worked over the years with various attorneys in the Rhode Island area including John and Joseph Bevilacqua and John F. Cicilline.

The petitioner has five siblings including his sister Clara Vasquez who was a co-defendant in his case.

In order to fully understand this case, this Court needs to begin its analysis by understanding that Juan Giraldo and his sister were as close to one another as any siblings could be. Everyday before work, the petitioner visited with his sister for morning coffee. Dinnertime was often spent together and their lives were intertwined in several other significant aspects.

Beginning in late 2003, Clara Vasquez told her brother Juan that her husband was interested in purchasing a kilogram of cocaine. During the first series of inquires Juan attempted to dissuade his sister and her husband from the venture. In fact, on two separate occasions Juan gave his sister money so that it would not be necessary for his sister and her husband to deal in cocaine to meet the monthly bills.

In early 2004, Juan's sister and her husband continued their efforts to get Juan to secure a kilogram of cocaine. By late February, the petitioner acquiesced and the husband began recording conversations. In a March 4th conversation the husband (Alberto Vasquez) and Juan discussed the price of a kilogram of cocaine which had been set by a third party seller. The husband offered during the same conversation, to introduce Juan to the person that Alberto would be selling to. This, presumably would have been an agent who was Alberto's controller at the time. Juan, however demurred, pointing out that it would be dangerous.

On March 7th, there was another conversation between Juan and Alberto and on this occasion there was discussion about the purchase of two kilograms at the price set by the third party seller for $23,000.00 per kilogram and their re-sale at $24,000.00 per kilogram. During the course of this intercepted conversation it was clear that Alberto, and not Juan, would make a $2,000.00 profit from the sale. Juan clearly said, "Yeah, you'll make $2,000.00."

On March 13, 2004 Alberto told the agents that Juan told him that he would be going to New York to arrange for the shipment of the cocaine that Alberto wanted.

On March 14th, Juan and a cousin went to Alberto's home early in the .- When Alberto returned to his home his wife gave him one kilo of co-ne. Alberto later called Juan to discuss payment and Juan refused to speak h him.

During the following 8 to 10 weeks Alberto attempted to get Juan to ply cocaine approximately twenty times, but Juan refused.

The petitioner -appellant was charged with conspiracy to possess with nt to distribute cocaine, [21 USC 841 (a) (1) and (b) (1) (B) and 846], and session with intent to distribute cocaine. [21 USC 841 9 (a) (1) and (b) (1)]. The indictment contained a leadership allegation but the petitioner never aded to that nor did he make any leadership admission. The defendant-ellant was sentenced at the top of the guideline to a term of 71 months.

SUMMARY OF ARGUMENT

The petitioner-appellants base offense level was 26. Two points were added under U.S.S.G. 3B1.1(c) for a leadership role. Level 28 was then

reduced to level 25 because he was accorded a three point reduction for acceptance of responsibility. On July 29, 2005 the petitioner was sentenced to a term of imprisonment of 71 months and ordered to pay a fine of $10,000.00.

The petitioner-appellant contends that the two point increase under 3B1.1 (c) was improper, because his conduct in this case does not evince any leadership role.

ARGUMENT AND LAW

The guidelines were adopted to enhance the ability of the criminal justice system to reduce crime through an effective fair sentencing system; and to provide uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders. U.S.S.G. Manuel, Introduction and General Application Principles, 1A1.1; Mistretta v. United States, 488 US 361 (1989); United States v. Snyder, 136 F.3d 65 (1st Cir. 1998); United States v. Labonte, 70 F.3d 1396 (1st Cir. 1995).

The guidelines, however, were not intended to discontinue the courts historical practice of considering the relevant circumstances of the defendant's real conduct whether those circumstances were specifically charged or not. United Sates v. Lombard, 72 F.3d 170 (1st Cir. 1995); United States v. Jackson, 3 F.3d 506 (1st Cir. 1993); see generally, Stephen Breyer, The Federal Sentencing

Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1 (1988).

As now Justice Breyer noted, the Guidelines evince a compromise between a pure "charge offense" system in which sentences are determined based solely upon conduct of which a defendant is convicted, and a "real offense" system in which sentences are fashioned in view of all relevant mitigating and aggravating factors surrounding the defendants conduct. id; United States v. Lombard, supra.

In the process of achieving that objective the primary goals of "certainty, uniformity and fairness" maintain their position as essential ingredients of the sentencing process. United States v. Unger, 915 F.2d 759 (1st Cir. 1990); cert denied, 498 US 1104 (1991); United States v. Mocciola, 891 F.2d 13 (1st 1989). In this case the addition of two points for a leadership role offends the intent of the guideline and results in sentence disparity.

The determination of a defendants role in an offense is heavily dependent on the facts of the particular case and as

such is subject to review under the clearly erroneous standard. United States v. McLean, 409 F.3d 492 (1st Cir. 2005); United States v. May, 343 F.3d 1 (1st Cir. 2003); United States v. Funtes-Moreno, 895 F.2d 24 (1st Cir. 1990); United States v. Wright, 873 F.2d 437 (1st Cir. 1989). The role determination requires the District Court to draw inferences from a variety of data including information in the pre-sentence report and the defendants statements and demeanor at the sentencing hearing. United States v. Herrera, 878 F.2d 997 (7th Cir. 1989); United States v. Mejica-Orosco, 867 F.2d 216 (5th Cir. 1990). It is a mixed fact-law question. United States v. Joyce, 70 F.3d 679 (1st Cir. 1995); United States v. Diaz-Villafane, 874 F.2d 43 (1st Cir. 1989).

The guidelines themselves do not specifically define "organizer, leader, manager or supervisor," but the commentary to the guidelines provides some basis for discerning when an upward adjustment for an aggravated role under 3B1.1 (c) is appropriate. United States v. Ventura, 353

F.3d 84 (1st Cir. 2003); United States v. Tejeda-Beltran, 50 F3d 105 (1st Cir. 1995); United States v. Fuller, 897 F.2d 1217 (1st Cir. 1990).

First, the comments clearly indicate that section 3B1.1 is intended to apply only to criminal activity engaged in by more that one participant. United States v. Morrero-Ortiz, 160 F.3d 768 (1st Cir. 1998). United States v. Abitoye, 923 F.2d 221 (1st Cir. 1991). Second, the evidence must show that the defendant exercised control over or was otherwise responsible for organizing the activities of other individuals in committing the crime. United States v. Laboy, 351 F.3d 578 (1st Cir. 2003); United States v. Lopez-Lopez, 295 F.3d 165 (1st Cir. 2002); United States v. Veilleux, 949 F.2d 522 (1st Cir. 1991). The enhancement requires some degree of control or organizational authority over others. United States v. Cali, 87 F.3d 571 (1st Cir. 1996); United States v. Fuller, 897 F.2d 1217 (1st Cir. 1990). Managerial status generally attaches if there is evidence that the defendant, in committing the crime, exercised control over or

was otherwise responsible for overseeing the activities of others. United States v. Webster, 54 F.3d 1 (1st Cir. 1995); United States v. Munoz, 36 F.3d 1229 (1st Cir. 1994); United States v. Savoie, 985 F.2d 612 (1st Cir. 1993).

The Court may draw on all relevant conduct when determining whether the defendant was an organizer or leader for the purposes of the guidelines. United States v. Laboy, supra; United States v. Ruiz-Batista, 956 F.2d 351 (1st Cir. 1992). It may also consider the exercise of decision making authority, the nature of his participation in the commission of the offense, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the alleged activity and the degree of control and authority exercised over others. U.S.S.G. 3B1.1 cmt. (N4); United States v. May, supra; United States v. Soto Beniquez, 356 F.3d 1 (1st Cir. 2003); United States v. Conley, 156 F.3d 78 (1st Cir. 1998); United States v. Graciani, 61 F3d 70 (1st Cir. 1990).

In United States v. McLean, 409 F.3d 492 (1st Cir. 2005) the Court upheld the assignment of a three level enhancement to Navarro because he was the local supervisor of all the conspirators in the state of Maine. The evidence showed that Navarro managed the assets of the conspiracy, controlled the local participants and re-supplied the local participants. Id 496.

In United States v. May, 343 F.3d 1 (1st Cir. 2003) the defendant conceded that he was a key player and a manager but argued that he had a middleman role that prohibited a four level enhancement. The trial court found that he was deserving of four points, and this Court approved because he and Barbour instigated the conspiracy; and because he recruited participants, received payments, divided the proceeds and took over the organization when Barbour was arrested.

In United States v. Laboy, 351 F.3d 578 (1st Cir. 2003) the court gave the defendant a four point upward adjustment because Laboy attended gang meetings and was

identified as a leader. Lower level gang members were directed to take their problems to Laboy, and he had several gang members selling drugs on his behalf.

In United States v. Picanso, 333 F.3d 21 (1st Cir. 2003) the defendant was given a four point leadership enhancement as an organizer because he coordinated others and was responsible as a wholesaler of bulk amounts of cocaine.

In each of those cases the court found core facts to support the enhancement. It was not a matter of intuition or speculation. Similarly, a court that assigns a two point increase must ground its decision on facts that demonstrate that the defendant was an organizer, leader manager or supervisor in any criminal activity. United States v. Soto Beniguez, 356 F.3d 1 (1st Cir. 2003).

In United States v. Stein, 233 F.3d 6 (1st Cir. 2000) the defendant was given a two point enhancement for his role in the offense. This Court, approved the two point enhancement because Stein devised and carried out a plan to

conceal the Wellfleet property, and met with the bankruptcy attorney for the purpose of providing information. He also attended the meeting of the creditors. The court found that Stein exercised continuing decision making authority, paid and authorized the payment of bills, and therefore was a manager or supervisor.

In United States v. Nelson Rodriguez, 319 F.3d 12 (1st Cir. 2002) the defendant was given a three level increase for being a manager or supervisor in criminal activity that involved five or more participants. The court agreed that he was a manager or supervisor because he controlled all of the beaches where drugs were imported and the group from Humicao, in the drug distribution efforts.

In United States v. Conley, 156 F.3d 78 (1st Cir. 1998) the court approved the assignment of managerial points because the defendant supplied addresses to San Diego sellers, recruited others as receivers for the falsely addressed packages and supervised their efforts.

In United States v. Kneeland, 148 F.3d 6 (1st Cir. 1998) the court approved a leadership enhancement because the defendant formed the company, rented office space for its operations and invited associates to join him in the fraudulent advance scheme.

In United States v. Berrios, 132 F.3d 834 (1st Cir. 1998) this court approved organizer or leadership points for a defendant who was always the person contacted when the heroin was to be purchased. He also set prices and determined the location of the transactions and was the person who hired the person to run the heroin store.

In United States v. Fosker, 124 F.3d 52 (1st Cir. 1997) the Court held that a defendant who assisted in devising the scheme, and who targeted the victims home was a leader of criminal activity. This defendant also provided the home in which the planning meeting took place and gave advise on whether weapons should be used.

In United States v. Cruz, 120 F.3d 1 (1st Cir. 1997) (en banc) the Court upheld the organizer-leadership

enhancement for a defendant who was at the center of a series of well organized drug and weapon sales. The defendant also involved various individuals as facilitators and as go betweens in an effort to limit his own involvement.

In United States v. Goldberg, 105 F.3d 770 (1st Cir. 1997) the court approved a management enhancement because the defendant managed the parts of the scheme involving false payroll and false documentation.

In United States v. Voccola, 99 F.3d 37 (1st Cir. 1996) the court approved the defendants managerial role because he was the owner of the body shop and directed his sister in law on how to handle the details of the insurance fraud.

These cases all support the notion that a managerial or leadership role envisions something more that a neutral relationship between parties who are each performing tasks to make the artifice work. There needs to be supervision of others, United States v. Mitchell, 85 F.3d 800 (1st Cir. 1996); United States v. Belardo-Quinones, 71 F.3d 941 (1st Cir. 1995); or extensive involvement in the planning or execution

stages of the crime. United States v. Camuti, 78 F.3d 738 (1st Cir. 1996); United States v. Twitty, 72 F.3d 228 (1st. Cir. 1995).

It is also proper to impose these enhancements where the defendant recruits others into the enterprise. United States v. Webster, 54 F.3d 1 (1st Cir. 1995); United States v. Conley, 156 F.3d 78 (1st Cir. 1998). All of these findings, however, must be rooted in the evidence and may not be based on a judges' hunch. United States v. Ortiz, 966 F.2d 707 (1st Cir. 1992). It is not sufficient if the parties are equals, United States v. Di Santo, 86 F.3d 1238 (1st Cir. 1996) or if the defendant worked with the leader and even performed duties which assessed the organizations risk of loss. United States v. Cali, 87 F.3d 571 (1st Cir. 1996).

In United States v. Frankhauser, 80 F.3d 641 (1st Cir. 1996) the court rejected a supervisory enhancement which was assigned because the defendant had greater experience than others in the artifice. The decision made it plain, that

where the activity was not otherwise extensive the defendant must have exercised direct control over other participants.

In United States v. Sostre, 967 F.3d 728 (1st Cir. 1992) the defendant contacted the source and escorted the purchasers to the room where the transaction took place. The evidence did not establish that he had a supervisory role over anyone, except his brother who served as a lookout. This court reversed a supervisory enhancement.

In United States v. Castellone, 985 F.2d 21 (1st Cir. 1993) the defendant determined who purchased the drugs and where the sales would take place. He also set the prices and determined his profit. This court reversed a managerial enhancement because these facts apply to every person who is a street level drug distributor.

The court in Castellone was obviously looking for some fact or combination of facts that would give the defendant a role as manager or supervisor. Merely, because he set the prices or decided when and with whom he would

deal was not by itself sufficient. The key is that the defendant must have others over whom he exercises control.

The Probation Department recommended the two point increase in the case against Giraldo because:

> It was Mr. Giraldo who had the numerous conversations with the cooperating witness and who negotiated the price per kilogram of cocaine. He was the decision maker in that he dictated how and when the deal would take place.

The court overruled the defendant-appellants objection to the two point leadership adjustment and said:

> As I indicated by my questions, I recognize the fact that Mr. Giraldo did not go into it for his own personal profit but rather as a favor to someone close to him. Nevertheless, once he

> was persuaded to do it, he was the conductor of the crime. He made the decisions. He effectively set the price. He called the shots. He was directing the other participants in the transaction. He was clearly the most concerned about the counter-surveillance and made decisions with respect to how to respond to that surveillance.

The Probation Department's assessment is disingenuous at best. First off, it counts little that the defendant and the cooperating witness had numerous conversations. What is important is what those conversations were about.

Mr. Giraldo did not negotiate any price. He simply told his brother in law that a kilo of cocaine cost $23,000.00 and that if he sold two of them for $24,000.00 he would earn $2,000.00.

The courts conclusion was also unsupported by the evidence in the case. He was the "conductor of the crime" like any other person who involved himself in a drug deal. He did not direct his sister or anyone else in the effort, and the only decision he made was to submit to the endless entreaties of his brother in law and his sister.

They were the ones who needed the extra money and they were the ones who set things in motion. He did not call the shots and he did not set the price. In fact he is no more that a passive facilitator.

The District Court said he "effectively set the price". What in fact happened is contained in a March 4th intercepted conversation. The CW asked what the price of a kilogram of cocaine was and was it selling for $22,500.00. The defendant said no, it's selling for $23,000.00.

On March 7th the defendant-appellant told the CW that he could get two kilograms for him at $23,000.00 per kilogram. The CW told the defendant-appellant he would sell them for $24,000.00 and the defendant-appellant told the

CW, that he, the CW, would make $2,000.00. The defendant-appellant not only would make nothing, but it was the CW who set the price at $24,000.00. The defendant-appellants' only role regarding the price was to tell the CW that the price he would be paying was $23,000.00.

On March 13th the defendant-appellant told the CW he was going to New York to get the cocaine. He presumably did that at the direction of the CW because the defendant-appellant was not making a profit and would not have gone to New York if he had not been asked to do so by the CW.

On March 14th the defendant-appellant was seen at the home of his sister in the presence of Louis Giraldo. Clara Vasquez told the CW that Louis Giraldo had dropped the kilogram off at the house. The facts also establish that the money for the purchase was furnished by the CW. That was part of the plan which the CW devised.

On March 16th the CW reported that the defendant-appellant had expressed concern about a Mercedes he had

seen on the previous day. He advised the CW that he had checked the plate and was told that the plate belonged to the FBI. The government admitted that it had no evidence that such a check had taken place.

On June 27th the defendant had another conversation about the Mercedes and a green Audi with tinted windows.

The court placed emphasis on the defendant-appellants concern about surveillance. Initially, it would appear that such concern is more characteristic of a first time offender than it would be of a seasoned law breaker. But more importantly it is not one of the signposts established by the commentary to 3B1.1(c). Being concerned about apprehension does not portray control over others or the organization of activities. There must be some showing the defendant-appellant directed a courier, or showed someone how to divide up or package cocaine, United States v. Jadusingh, 12 F.3d 1162 (1st Cir. 1994) or that he recruited others. United States v. Talladino, 38 F.3d 1255 (1st Cir. 1994). In this case all of that activity was conducted by the

CW, and the defendant-appellant did no more then follow the suggestions of the CW. It was the CW who was responsible for organizing the transaction. The defendant-appellant did no more than follow his directive by securing the cocaine.

The history of this section of the guidelines establishes that these enhancements were created because of concerns about relative responsibility. Persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public. The Sentencing Commission's intent, therefore, was to provide added punishment for people who fall into that category. It was not the Commission's intention to punish people, with additional jail time simply because they puffed smoke.

The Seventh Circuit specifically rejected an adjustment under this section where there was insufficient evidence that the defendant had any greater responsibility for the drug operation than anyone else who was involved in the offence. United States v. Vargas, 16 F.3d 155 (7th Cir. 1994).

See also United States v. Fermin, 32 F.3d 674 (2nd Cir. 1994). The defendant must occupy one of the roles in the enhancement guideline as an organizer, leader, manager or supervisor because it is not enough that he may have been more culpable then the others, United States v. Harper, 32 F.3d 1387 (9th Cir. 1994) or because the pre-sentence report has portrayed him as a leader. United States v. Catano, 65 F.3d 219 (1st Cir. 1995).

If there was a leader or organizer in this case it was the cooperating witness and no one else. He is the one who formulated the plan, he is the one who decided when and under what circumstances the transaction would occur and he is the one who directed and controlled the others in the plot. He is also the one who would have received the only profit.

It is not enough for the Court to say the things it did without citing some factual basis for its findings. A conclusion like this is no more than a hunch. United States v. Ortiz, 966 F.2d 707 (1st Cir. 1992).

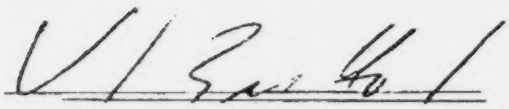
CONCLUSION

Based upon the foregoing points, facts, arguments and authorities, the Petitioner respectfully request this Honorable Supreme Court grant the within writ and reverse the Judgment of the United States Court of Appeals for the First Circuit.

Respectfully Submitted,

Juan A. Giraldo,

By his Attorney,



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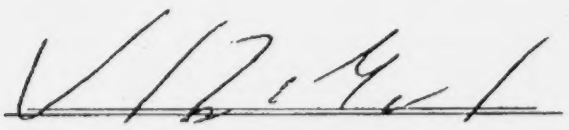
CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a) (7) (C), I, Victor J. Beretta, certify that the word processing system of my office has determined that this document (excluding the table of contents, the table of authorities, the certificate of compliance, the appendixes and the certificate of service) contains 3,981 words.



Victor J. Beretta, Jr., Esquire

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

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No.

JUAN A. GIRALDO
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v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT FOR THE FIRST CIRCUIT

PETITIONER APPENDIX

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Appeal No. 05-2192

UNITED STATES OF AMERICA
Appellee

V.

JUAN GIRALDO
Defendant– Appellant

GOVERNMENT'S MOTION FOR SUMMARY DISPOSITION

Pursuant to First Circuit Local Rule 27[c], the government respectfully requests that the Court summarily affirm the judgment of the district court on the ground that no substantial issue is presented by this appeal.

This is Juan Giraldo's appeal pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291 from a sentence imposed upon him by the Honorable William E. Smith on July 29, 2005. Giraldo pleaded guilty to a two-count indictment charging him with conspiracy to distribute and to possess with intent to distribute

500 grams or more of cocaine, 21 U.S.C. § 846 (Count One), and possession with intent to distribute 500 grams or more of cocaine, 18 U.S.C. § 841(a) (1) (Count Two); he was sentenced to concurrent terms of 71 months' imprisonment to be followed by 60 months supervised release, a $10,00 fine, and a $200 special assessment. The judgment was entered on the docket on August 4, 2005, and a notice of appeal was timely filed the same day. (An amended judgment adding a recommendation that Giraldo be designated to FMC– Devens was entered on august 19, 2005.)

In this appeal Giraldo claims that the district court (Smith, J) erred by increasing his total offense level by two levels of pursuant to USSG §3B1.1 [c] for being a leader, organizer, manager, or supervisor of criminal activity involving fewer than five participants. This Court should summarily affirm the judgment below because Giraldo's appeal raises no substantial issue.

REVELANT FACTS

The facts of the underlying case can be gleaned from paragraph 14 of the Pre-sentence Report ("PSR"). See United States v. Castellone, 985 F.2d 21 (1st Cir. 1993) ("Because [defendant] pled Pre-sentence Report (PSR) and the transcript of the sentencing hearing." Giraldo made no objections to this portion of the PSR, and the district court expressly relied on it in making its role determination. [App. at 21-22]. (To the extent of Giraldo's "Statement of Facts" asserts contrary facts concerning the origins and conduct of the cocaine transaction, see App. Br. At ix-xi, this court should disregard them, because those contrary facts do not appear in the record.)

On March 4, 2004, a cooperating witness ("CW") has a consensually-recorded conversation with Giraldo in which the CW asked Giraldo about the price of a kilogram of cocaine. Giraldo told the

CW that the price was $23,000. The CW offered to introduce Giraldo to the CW's own cocaine customer so they could conduct business directly, but Giraldo refused, stating that he thought it was too dangerous.

On March 7th 2004, the CW spoke to Giraldo again and told him that his (the CW's) customer wanted two kilograms of cocaine and could pay $30,000 that day and the rest the following day. Giraldo replied I can get them for you, but it's a great risk." Giraldo explained, "one of my guys, a few days ago got caught around here with 15 kilos." Giraldo then made some additional comments about how no one could be trusted. Giraldo told the CW that he told his own supplier $23,000 per kilogram, and the CW indicated that he quoted a price of $24,000 to his customer. Giraldo said "Yeah, you'll make $2,000," meaning a $2,000 profit from the sale of two kilograms.

On March 13, 2004, Giraldo met the CW at

the home of Giraldo's sister, Clara Vasquez, and told the CW that he (Giraldo) was going to New York to arrange a shipment of cocaine and would return later that night. Giraldo promised to sell the CW one kilogram of cocaine upon his return.

The following afternoon (March 14,2005), Giraldo had his cousin, Louis Giraldo, drop off a kilogram of cocaine at Vasquez's house while the CW was not there. Vasquez later told the CW what had occurred in his absence: Louis Giraldo arrived with the cocaine, told Vasquez the cocaine was in the car, and Vasquez instructed him ton bring it inside. When the CW has returned to the house, Vasquez gave him the cocaine, and the CW then left the house again, purportedly to deliver the cocaine to deliver the cocaine to his customer. (In fact, the CW delivered the cocaine to waiting DEA agents.)

While the CW was pretended to deliver the cocaine, he spoke to Vasquez on the phone and told

her that she would have to wait for him to return because "I have to count the money." A few minutes later, the CW called Giraldo on Giraldo's regular cell phone and said "Listen to me... I already, already went to the guy to do that errant with him, indicating that the CW had delivered the cocaine to his customer. Before the CW could say anything further, Giraldo yelled at him, "Listen, Listen! Why are you calling this telephone, fucker! [i.e. referring to his prepaid cell phone, which could not easily be traced to him]. Don't start that fuckin shit! You know you're not supposed to call me on his phone!"

A few minutes later, the CW called Vasquez back and told her that he was waiting for his customer's girlfriend to bring the rest of the money for the drugs and that he had just made a call to Giraldo's cell phone in an effort to tell Giraldo the same thing. Vasquez replied, "Oh! The very first thing I told you was.... Not to call him...! Why didn't

you call me? [I told you] not to call him . . . !

Law enforcement agents provided the CW with the money to pay for the cocaine and establishment surveillance of Vasquez's residense so that they could observe him deliver it. Approximately ten minutes after they did so, Giraldo's cousin, Carlos Giraldo then drove up behind another pair of surveillance agents who were in a maroon Mercedes and appeared to take down their license plate number. The CW, meanwhile, entered Vasquez's residence and later reported that he had given her the money for the cocaine. The CW also later reported that he was present that evening when Juan Giraldo arrived at the residence, went into the bedroom with Vasquez, and then told the CW that the money was "good", meaning the full amount was there.

On March 16,2004, the CW reported that he had spoken to Giraldo the previous day (i.e. the day after the sale) and that Giraldo had said that he was

worried about the Mercedes that had been outside Vasquez's residence at the time of the sale. Giraldo told the CW that he had checked the license plate of the Mercedes with a "friend" and had been told that the car was an FBI car. (The government currently has no evidence that Giraldo told the CW not to worry because he knew the "feds" were investigating him and that it had nothing to do with the CW. Giraldo then said that if the CW wanted any more drugs, he should contact Giraldo in person rather than on the phone.

During the next eight to ten weeks, the CW tried to negotiate the purchase of another kilogram of cocaine from Giraldo; Giraldo never declined, but kept putting the CW off. On June 7,2003, the CW had a consensually recorded conversation with Giraldo in which Giraldo explained that he did not want to sell the CW more drugs at that time because he was still worried about the police surveillance on March 14

involving the green Audi and maroon Mercedes. Giraldo said.

> Because, them people are smart...they know I am big and that I have very good connections. So they don't just want to get a Kilo, they want to find out where everything is and then get you really good..... Because that car (i.e. the maroon Mercedes), that car Belongs to DEA. That car,that red car that was there that day. And them people were there, it was for a reason. because after you came here, we were leaving and that other car was behind you and that car is form DEA also, it is a green Audi with tinted windows they were behind you... Because when you were coming up Branch Avenue, we were coming down. so I was even

going to drive back to get the money, and when I saw that Audi behind you, I said to myself, 'Fuck no.'

B. The Sentencing Proceeding

The PSR assigned Giraldo a base offense level of 26 based on the quantity and type of drugs involved in the charged crimes (i.e. 1,001 grams of cocaine). It then added two levels pursuant to USSG §3B1.1 [c] on the ground that Giraldo was a leader, organizer, manager, or supervisor of criminal activity involving fewer than five participants, and it subtracted three levels pursuant to USSG §3E1.1 for acceptance of responsibility, yielding a total offense level of 25. [PSR ¶¶ 16, 18, 31, 32]. Giraldo made a timely objection to the upward adjustment for role in the offense, which the Probation Officer rejected in her July 19, 2005 addendum to the PSR.

At the July 29, 2005, sentencing hearing, the

district court heard argument from both sides and ultimately agreed with the Probation Officer and the government that Giraldo should not receive a two-level upward role adjustment.

The court stated:

> I recognize the fact that Mr. Giraldo did not initiate this transaction, and perhaps did not go into it for his own personal profit but rather as a favor to someone close to him. Nevertheless, once he was persuaded to do it, he was the conductor of the crime. He made the decisions. He effectively set the price. He called the shots. He was the one that was directing the other participants in the transaction. He was clearly the most concerned about the counter-surveillance and made decisions with respect to how to respond to that surveillance.

[App. At 22].

ARGUMENT

I. The District Court's determination that

Giraldo was an Organizer, Leader, Manager or Supervisor Was Not Clearly Erroneous.

As this Court has repeatedly explained, "because role-in-offense determinations are inherently fact-specific, the district court's views demand considerable respect...and are reviewed on appeal only for clear error or mistake of the law." United States v. Talladino, 38 F. 3d 1255, 1261 (1st Cir. 1994) (quoting United States v. Ocasio, 914 F. 2d 330, 333 (1st Cir. 1990)); accord United States v. Mclean, 409 F 3d 492, 499 (1st Cir. 2005); United States v. Cruz, 120 F. 3d 1, 3 (1st Cir. 1997) (en banc).

Section 3B1.1 [c] of the Sentencing Guidelines provides for a two-level enhancement "(if) the defendant was an organizer, leader, manager, or supervisor in any criminal activity" that involved fewer than five participants. The commentary to

section 3B1.1 [c] states that, in making the role determination,

(f) actors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. USSG §3B1.1, comment. (n.4.)

Virtually every one of these factor supports the district court's finding that Giraldo wan an organizer, leader, manager, or supervisor of the crimes charged in the indictment. First, Giraldo exercised nearly exclusive decision making authority with respect to all aspects of the cocaine transaction. He is the one who obtained the kilogram of cocaine, determined the price at which he would sell it to the

CW, and dictated the time, place, and manner of delivery. He also engineered the counter-surveillance, followed up on it, and then made the decision that it was too dangerous to arrange a second sale despite the CW's repeated requests that he do so.

Specifically, even though the CW originally wanted to buy two kilograms of cocaine, Giraldo agreed to sell him only one, and Giraldo dictated the price the CW would have to pay ($23,000). Giraldo chose the date on which the sale would occur (March 14, 2005), the place where it would occur (Giraldo's sister's house), and the manner in which it would occur (Louis Giraldo delivered the kilo to Clara Vasquez at her house, and she gave it to the CW). Giraldo refused to meet the CW's own customer on the ground that it was too dangerous, and he refused to talk to the CW over the phone about the CW's efforts to collect payment. When the CW returned to Vasquez's house with the money, Giraldo's cousin,

Carlos Giraldo was performing counter-surveillance in Giraldo's Lexus, and Giraldo later determined correctly that the cars Carlos Giraldo had seen were undercover law enforcement vehicles. Giraldo then decided not to sell the CW additional kilos of cocaine because of this law enforcement scrutiny. In light of these facts, the district court had ample basis for its finding that Giraldo "was the conductor of the crime" who "called the shots" and "made the decisions." (App. 22).

Second, the nature of Giraldo's participation in the offense reflects his role as a leader/organizer. Giraldo performed the high-level functions of obtaining the drugs, setting their price, determining the time, date, and manner of delivery, and receiving the payment; he carefully avoid the low-level "dirty work" of actually handing the drugs over to the customer, collection the money from the customer, acting as a "lookout", or even talking to the customer

over the telephone, by using others to perform these tasks. See Cruz, 120 F. 3d at 3-4 (upholding upward role adjustment in part because defendant "involved various individuals not only as facilitators but also as go-betweens in an effort to limit his own apparent involvement," a "pattern [that] is familiar in many sophisticated but illegal transactions"). Giraldo's role in determining that the blue Audi and maroon Mercedes were in fact surveillance vehicles, and then making the strategic decision that it was too dangerous to attempt a second sale, only confirm his leadership role in the conspiracy.

Third, Giraldo's recruitment of accomplices, and the degree of control and authority he exercised over them, are characteristic of both a leader/organizer and a manager/supervisor. Giraldo used his cousin Luis Giraldo to drop off the cocaine at his sister Clara Vasquez's residence; he used Vasquez to deliver the drugs to the CW, collect the money, and

talk to the CW on the telephone; and he used his cousin Carlos Giraldo to conduct counter-surveillance outside his sister's residence on the day of the transaction. These facts provide ample grounds for the court's conclusion that Giraldo "was the one that was direction the other participants in the transaction." [App. at 22].

Fourth, Giraldo's degree of participation in planning or organizing the offense was high. As has already been noted, Giraldo determined when, where, and how the drug sale would occur; how much would be sold and at what price; who would participate and what roles they would play; and whether or not there would be future sales.

The facts of this care are at least as compelling as those in United States v. Berrios, 132 F 3d 834 (1st Cir. 1998), where this Court upheld an upward role adjustment merely because the defendant "was always the person contacted when heroin was to

be purchased," "always returned pager calls," "set prices and determined the location of the transactions," was sometimes accompanied by "subordinates," and hired someone to mind a "heroin store." Id. At 839.

In contrast, the cases on which Giraldo chiefly relies -- United States v. Castellone, 967 F 2d. 728 (1st Cir. 1993) — are nothing like this one. In Castellone , an undercover officer made two one-pound marijuana purchases from the defendant, met the defendant's supplier during the second purchase, and then began dealing directly with the defendant's supplier. Castellone, 985 F. 2d at 22. Over the objection of both the government and defense counsel, the district court found that the defendant was a manager/ supervisor. Id. at 26. This court reversed because the evidence failed to show that the defendant was anything more than an ordinary street level dealer, who did not organize or exercise control

over anyone. Id. at 26. Here, in contrast, the evidence showed Giraldo to be a sophisticated, high-level drug trafficker, who not only made all major decisions about a one-kilogram cocaine who not only made all major decisions about a one- kilogram cocaine transaction but also enlisted others to deliver the drugs, collect the money, communicate with the buyer, and conduct counter-surveillance. Furthermore, unlike the district court in Castellano, which essentially made no findings in connection with its role determination, the court below specifically found that Giraldo "made the decisions" and "called the shots", that he "direct(ed) the other participants in the transaction," and that he "was clearly the most concerned about the counter-surveillance and made decisions with how to respond to that surveillance." [App. At 22].

In Sostre, the Court held that it was an error to characterize the defendant as a manager/supervisor

because "(a) t no time was [the defendant] shown to have control over the cocaine.... he [was not] the principal with whom the government agent transacted the sale.... [a]t all times he had to make contact with his codefendants before making representations to the buyers..., and [t]here is nothing in the record to show that he exerted control over any of the other codefendants, with the possible exception of his brother, who served as a lookout." 967 F. 2d at 733. Here, in contrast, Giraldo *had control* over the cocaine, *he* was the principal with whom the government agent transacted the sale, he never told the CW he had to get back to him on anything but instead simply dictated the quantity and price of drugs he would sell and the time, place, and manner of the sale, and he enlisted at least three other people (i.e. Carlos Giraldo, Louis Giraldo, and Clara Vasquez) to deliver the drugs, collect the money, and perform countersurveillance.

Giraldo's argument that the CW, rather than Girlaldo, was the leader, organizer, manager or supervisor of the conspiracy is without merit. (Throughout Giraldo's brief, he refers to the CW as Vasquez's husband and/or his own brother-in-law.) The CW did not set the price at which he purchased the cocaine from Giraldo; he did not even bargain about it. He simply asked Giraldo the price and ace pted what he was told. Similarly, the CW asked Giraldo for two kilograms, but had to wait until March 14, 2005, to buy it, which is the date on which on which Giraldo decided to sell it to him. The CW did not know where, when or how the cocaine would be delivered to him until he actually received it; all those decisions were made by Giraldo. The CW had no control over the actions of Luis Giraldo, Carlos Giraldo, or Clara Vasquez, because all three were acting at Giraldo's direction. The CW did not instigate and direct the counter-surveillance or follow

up on it. Finally, if it was not perfectly clear who was calling the shots before March 14, 2005 sale, it was perfectly clear afterwards, because the CW repeatedly asked Giraldo to sell him more cocaine, but Giraldo refused on the grounds that it was too dangerous.

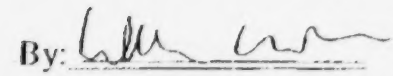
CONCLUSION

Because the district court's factual finding that Giraldo was a leader, organizer, manager and/or Supervisor of the conspiracy was not clearly erroneous, and because Giraldo's appeal raises no substantial issue, the government respectfully requests that the appeal be summarily denied. Should the Court find that it cannot dispose of this appeal on the government's motion for summary disposition, the government respectfully requests permission to file a responsive brief.

Respectfully submitted,

MICHAEL J. SULLIVAN

United States Attorney

By: 

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Certificate of Service

I, William Weinreb, AUSA, certify that I caused this motion to be served by first-class mail on the defendant's attorney, Victor J. Beretta, Jr., Esq., 381 Atwells Avenue, Providence, RI 02909 on March 9,2006.

WILLIAM D. WEINREB

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APPENDIX "B"

United States Court of Appeals

For the First Circuit

No. 05-2192

UNITED STATES,

Appellee,

V.

JUAN GIRALDO,

Defendant, Appellant.

Before

Boudin, Chief Judge,

Torruella and Howard, Circuit Judges

JUDGMENT

Entered : March 17, 2006

The government's motion for summary disposition is granted. The district court's factual determination that defendant Juan Giraldo was an

organizer of leader of the criminal conspiracy and decision to impose a two-level enhancement to his total offense level pursuant to USSG §3B1.1 were not clearly erroneous. United States v. Talladino, 38 F. 3d 1255, 1261 (1st Cir. 1994)

Therefore, after careful review of the parties' filings and the record, the sentence imposed by the district court is summarily affirmed. See 1st Cir. R 27 [c].

By the Court:

Richard Cushing Donovan, Clerk

By: MARGARET CARTER

Chief Deputy Clerk

[cc; William D. Weinreb, AUSA, Dina Michael Chaitowitz, AUSA, Randy Olen, Esq., Victor J. Beretta, Esq.]